

1 JEFFREY M. VUCINICH, ESQ. BAR#: 67906
2 JOSHUA W. ROSE, ESQ. BAR#: 191024
3 CLAPP, MORONEY, BELLAGAMBA and VUCINICH
A PROFESSIONAL CORPORATION
4 1111 Bayhill Drive, Suite 300
San Bruno, CA 94066
(650) 989-5400 (650) 989-5499 FAX

5 Attorneys for Defendant and Cross-Complainant
PAULEY CONSTRUCTION, INC.

6

7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10

11 SIFA TUIAKI and LUPE TUIAKI,

12 Plaintiffs,

13 v.

14 PACIFIC GAS AND ELECTRIC
COMPANY, PAULEY
15 CONSTRUCTION, INC., TRAFFIC
SOLUTIONS, INC., ADELPHIA
16 TELECOMMUNICATIONS CO., INC.,
SBC TELECOMMUNICATIONS, INC.,
17 MOBILE TOOL INTERNATIONAL, INC.
dba TELSTA, COUNTY OF
18 MENDOCINO, STATE OF
CALIFORNIA, PACIFIC BELL
19 TELEPHONE COMPANY, PACIFIC
TELESIS GROUP, SBC OPERATIONS,
20 INC., and DOES 1 to 50,

21 Defendants.

22 AND RELATED CROSS-ACTION.

CASE NO.: C07 2257 JCS

23

24

25

26

27

28

**PAULEY CONSTRUCTION, INC'S.
NOTICE OF MOTION AND MOTION
TO REMAND TO STATE COURT [28
U.S.C. §1447(c)]**

Date: June 22, 2007
Time: 9:30 a.m.
Location: Courtroom A, 15th Floor
Judge: Magistrate Judge Joseph C. Spero

TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 22, 2007, at 9:30 a.m. or soon thereafter as the matter can be heard in Courtroom A, 15th Floor, of the above-noted Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, Cross-defendant PAULEY CONSTRUCTION INC.

1 ("Pauley") will move the Court to Remand this action to State Court, pursuant to 28 U.S.C. § 1447
 2 (c) and Northern District of California Civil Local Rule 7.1, on the grounds that removing party,
 3 Adelphia Communications Corporation's (hereinafter "Adelphia") Notice of Removal was defective.
 4 Adelphia's purported Notice of Removal was tardy. In addition, Adelphia's Notice of Removal fails
 5 to include the requisite short and plain statement of the grounds for removal. Moreover, Adelphia's
 6 Notice of Removal is clearly designed to "forum shop" after four years of litigation in State Court.
 7 Adelphia's pleading against Pauley is not about augmenting or detracting from the Chapter 11
 8 bankruptcy estate (the pot of money that may eventually go to creditors). Instead, it is about
 9 Adelphia's attempt to recoup money for its insurance carrier. Thus, Adelphia should be estopped from
 10 contending now that this is action should be in Federal Court, as this matter is not materially "related
 11 to the Chapter 11 cases or the plan..." (Adelphia's Notice of Removal at ¶8, lines 8-10.)

12 Adelphia's Notice of Removal at page 2, paragraph 5, lines 17-20 disingenuously states that
 13 "On March 26, 2007, PAULEY demurred to ADELPHIA'S 1st Amended Cross-Complaint, *for the*
 14 *first time raising issues arising under the bankruptcy code...*" (Emphasis added.) This misstatement
 15 is simply untrue.

16 In fact, Pauley brought the bankruptcy issue and its position regarding the same to Adelphia's
 17 attention in Pauley's Motion for Judgment on the Pleadings, served on Adelphia on January 8, 2007,
 18 and filed on January 9, 2007, in the San Francisco Superior Court action, entitled *Sifa Tuiaki and Lupe*
 19 *Tuiaki v. Pacific Gas and Electric Company, et al.*, San Francisco Superior Court Case No. CGC-03-
 20 419761 (Consolidated with 04-432476). The bankruptcy issue was further raised in Pauley's Reply,
 21 filed on February 6, 2007, to Adelphia's Opposition to Pauley's Motion for Judgment on the
 22 Pleadings. Clearly, Adelphia first knew or should have known about its right to remove by January
 23 9, 2007, and Pauley contends that Adelphia knew a lot earlier than that.

24 Moreover, this issue was discussed, in great detail, at the January 11, 2007 Mediation session
 25 before Hon. Alfred G Chiantelli (Ret.), wherein the entire case settled, except for Adelphia, who
 26 settled with plaintiffs the next day. Thus, the only remaining pleading in the Tuiaki action is
 27 Adelphia's Cross-complaint against Pauley. It also comprised a large section of Pauley's mediation

28

1 brief that was served on Adelphia.

2 Finally, according to the very documents that Adelphia asks this Court to take Judicial Notice
 3 of, Adelphia has had notice of Pauley's bankruptcy claim since at least September 30, 2003. In
 4 addition, Adelphia's Notice of Removal and accompanying Request for Judicial Notice indicate that
 5 the Chapter 11 plan has been confirmed. However, nowhere contained within that confirmed plan is
 6 Adelphia's assumption of the July 7, 2000 contract with Pauley. As such, the executory contract
 7 (performance is due to some extent on both sides) is deemed rejected and breached by Adelphia
 8 immediately before the filing of the petition. (See 11 U.S.C. §§365(g), 502(g).) As such, Adelphia
 9 cannot allege causes of action against Pauley under the contract that it breached.

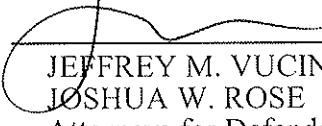
10 Thus, for Adelphia to state now that Pauley, for the first time on March 26, 2007, raised issues
 11 under the bankruptcy code, is incorrect. Adelphia's Removal is simply one more attempt to prolong
 12 and delay the litigation of its cross-action.

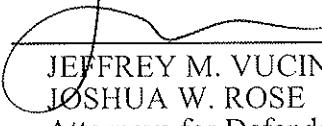
13 The motion will be based on this Notice of Motion and Motion, the Memorandum of Points
 14 and Authorities served and filed herewith, the Declaration of Jeffrey M. Vucinich served and filed
 15 herewith, the Request for Judicial Notice served and filed herewith, the pleadings and papers filed
 16 herein, and any other written or oral argument or evidence that may be presented at the hearing on this
 17 motion.

18 DATED: May 14, 2007

CLAPP, MORONEY, BELLAGAMBA
 and VUCINICH

20 By:


 JEFFREY M. VUCINICH


 JOSHUA W. ROSE

Attorneys for Defendant, Cross-Complainant,
 Cross-Defendant PAULEY CONSTRUCTION,
 INC.

24

25

27

28